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## BOOK REVIEWS

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COLLECTED LEGAL PAPERS, by Oliver Wendell Holmes. (New York: Harcourt, Brace and Howe, 1920, pp. 316.)

It is not necessary for one who has read the opinions of Mr. Justice Holmes as they appear in the reporters to seek elsewhere for evidence of his learning and scholarship, and yet it is very fitting that there should be collected the Justice's historical essays and the reflections on legal philosophy to which he has given voice in places other than from the bench.

In the present volume one is, perhaps, impressed most by the historical essays, partly because they represent keen and exacting labor, and partly because they are in comparison with the other essays by far the most valuable and eminently worth preserving. It is in particular as to some of the ideas laid down by the Justice in his philosophic reflections on the law that this review will speak.

In the last essay—On Natural Law—the author remarks that “the jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere”. This sentence is perhaps characteristic of the essay and of the attitude of the Justice toward that system of thought which has been known since the days of the Stoics as natural law. Briefly stated, the attitude of the author is essentially that of a man whose early beliefs in the canons of natural law having been shattered by disillusioning observance, now finds in the existence of such a system of law or of thought, as some may choose to call it, a danger, or, if not that, at least an excrescence on the body of existing positive law which it is desirable to ignore, if not to remove. This is a point of view which to a great many people is not at all acceptable.

Natural law derives its power from the conviction in its validity, but very often, either through a tacit observance or through actual legislation, it becomes positive law. This conviction in the higher law is not necessarily antagonistic to positive law, even where it is not a part of the latter. The conception of natural law, no matter in what form it appears, is the idealistic element in the law which nothing else can successfully supply. The conviction that such a law is binding, without any judgment upon its fundamental truth, or without any further sanction than the conviction as to its binding effect, is sufficient to give it legal force.

The positive law by which men live is brought into being in two ways. It arises on the one hand in the form of custom where, reduced to its lowest terms, we may say that the recurrence of a certain state of facts eventually produces a conviction in the normative character of this reiteration of fact. The other way in which positive law comes into being is that a conviction in abstract principles is realized in concrete form, either through legislation or through judicial determination. The natural law, being, as has been indicated, the idealistic element in our

producing forces. We can no more escape its effect than a man can escape his own shadow. It is sufficient for the purpose of the jurist that he realize a particular conception as not being positive law, but merely existing as a natural law concept—in other words, an ideal about which men build their positive regulations. And if he have the courage of his power of discrimination, he need not fear the effects of such elements upon his thinking.

If we give to natural law a place such as this, there is no need to jeer at persons who believe in natural law. Indeed it seems not only proper but practical that a belief in natural law should be fostered. And yet, whether or not such a belief is in any way furthered by legal or political writers, the conviction in a natural law which seems to be general among human beings will persist. As soon as positive law reaches a certain state of rigidity, and where, more particularly, legislation largely the result of political opportunism has encroached too far upon the idealistic strain which men, however material their daily lives, seem never utterly to lose, we have the growth of natural law concepts often of sufficient force totally to sweep away the existing positive law. There is no better, or perhaps more trite, illustration of this fact than the turn which the writings of Grotius and his followers gave to the *jus naturale* of the Stoics, and which in the hands of Locke, Pufendorf and Wolff was developed into a theory of right which produced far-reaching consequences in the American Revolution and later on in France.

At the present day we find reviving in Europe a growing tendency to advert to principles of natural law as a means of bringing human beings out of the bondage of a very labyrinth of positive law and enactment which the conditions of the war imposed upon them, to a sort of liberty which would make life in some way more tolerable. Perhaps the time will arrive in this country when the general belief in rights which natural law alone confers will produce among men a reaction against the oppression of positive legislation in which they do not participate. It is interesting to observe that the author takes so sharp a rational stand against natural law, when the spirit of this body of thought wholly pervades his philosophic essays.

To the reflective person, the inquiry must inevitably occur whether we can well afford to scorn the idealism of natural law simply because, having no sanction, we deny it the power of true positive law, and accept as more preferable doctrines of positive law, however antiquated, such as the Supreme Court recently adhered to in the case of *Grant Co. v. United States*,<sup>1</sup> merely because we believe that the fact of its being positive law lends an inviolable sanctity.

The jacket of the present volume indicates that a list of Mr. Justice Holmes' constitutional opinions is appended. It is to be regretted that this promise is not fulfilled in the volume reviewed.

JULIUS GOEBEL, JR.

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<sup>1</sup> 41 Sup. Ct. 189.